

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

COMMUNITY CENTRAL BANK,

Plaintiff,

v.

Case No. 11-10059

MORTGAGE NOW, INC.,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION *IN LIMINE*

Someone wanting to litigate a “claim” for money from “the assets” of a bank in FDIC receivership must first take the claim to the FDIC for review. 12 U.S.C. § 1821(d)(13)(D)(i). The bar to suing in court before FDIC review is jurisdictional. In this action Talmer Bank and Trust (TBT), which bought from FDIC the assets of a defunct bank (the named plaintiff, Community Central Bank, (see Dkt. # 63 at 6)), sues Mortgage Now, Inc. (MNI), which says by way of defense that it is owed some of the assets TBT bought. TBT argued in a motion for summary judgment that MNI's pursuit of the assets is barred—MNI never sought FDIC review; but the motion was stricken summarily because TBT submitted it after the dispositive-motion deadline. TBT now moves *in limine* to exclude from trial evidence of MNI's putative defense. Ordinarily a party may not circumvent a motion deadline or otherwise have a free “second bite” at an issue simply by refreshing and re-framing its legal argument as an “evidentiary” argument in a motion *in limine*. See *Louzon v. Ford Motor Co.*, ___ F.3d ___, 2013 WL 2398042, *5-*6 (6th Cir. 2013); *Goldman v. Healthcare Mgmt Sys., Inc.*, 559 F.Supp.2d

853, 871 (W.D. Mich. 2008). Because it is jurisdictional, however, the matter TBT raises may, and should, be resolved at whatever time it is noticed. See *Freeland v. Lib. Mut. Fire Ins. Co.*, 632 F.3d 250, 252 (6th Cir. 2011); see also Fed. R. Civ. P. 12(h)(3).

MNI seeks the defunct bank's assets as a setoff, calling that a permissible "affirmative defense"—even though a setoff, while labeled a "defense" on occasion, functions as a counterclaim. An affirmative defense designs to evade liability ("Even though I may be liable, your time to sue me has run out"; "I did what you claim, but I'm immune from suit," etc.). Setoff, on the other hand, aims to meet liability with liability ("I'm liable? Well, so are you"). The defendant attempts to "set off"—subtract—from the plaintiff's claim a debt the plaintiff owes the defendant. 20 Am. Jur. 2d *Counterclaim, Recoupment, etc.* § 6 (2013). A person raising an affirmative defense tries to duck; a person seeking a setoff tries to *punch back*. Hence the general rule that setoff "must be asserted as a counterclaim rather than a defense." 20 Am. Jur. 2d *supra* § 6; see also *id.* § 7. And, in a case such as this, a counterclaim is a "claim" in need of FDIC review. The common objection to treating a defense as such a "claim" is that people should not, in anticipation of a lawsuit, have to present the FDIC hypothetical defenses that, in the absence of a lawsuit, will remain dormant and useless. A counterclaim, however, is just a claim, like any other, that can stand alone. In brief, nothing forced MNI to wait until this action to "claim" some of the defunct bank's "assets," so nothing allows the unreviewed "claim" for "assets" to proceed. *Accord Am. First Fed., Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259 (11th Cir. 1999) (holding that a defense of setoff is a "claim"); *Rathbun v. IndyMac Mortg. Servs.*, ___ F.Supp.2d ___, 2013 WL 75782, *4-*5 (D. Mont. 2013) (same); *Resolution Trust Corp. v. Youngblood*, 807 F.Supp. 765, 770-71

(N.D. Ga. 1992) (same); see also *Multibank 2009-1 v. PineCrest*, 857 F.Supp.2d 1072, 1077-81 (D. Or. 2012). Accordingly,

IT IS ORDERED that the motion *in limine* [Dkt. # 66] is GRANTED in that MNI's setoff defense is STRICKEN.

s/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: August 13, 2013

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, August 13, 2013, by electronic and/or ordinary mail.

s/Holly Monda for Lisa Wagner
Case Manager and Deputy Clerk
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